Supreme Court of the United States

OCTOBER TERM 1944

No.

WILHELM SCHEFOLD,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

Specification of Errors

1. It was error for the District Court to overrule petitioner's demurrer and deny his motion to quash the indictment upon the ground that the facts and acts alleged therein do not charge the defendant with any crime or offense under or against any law of the United States.

2. It was error for the District Court to entertain the indictment, to accept the petitioner's plea thereto, and to enter its judgment and commitment thereon, for the reason that the Court was at all times without jurisdiction to take any action in the premises.

Statement of Fundamental Premise

All legislative power is vested in the Congress. Congress alone can define crimes and prescribe punishments.

The Congress may not delegate this power, but it may enact a legislative standard for the guidance of the Executive.

Rules and regulations promulgated by the Executive Department, in accordance with such a standard, have the full force of law, and may be enforced by criminal prosecution if non-compliance therewith, or a violation thereof, has been defined as a crime against the United States by an Act of Congress.

In the absence of a legislative standard, and in the absence of specific Congressional ratification, rules and regulations promulgated by the Executive Department are mere administrative rules and regulations, and things required thereby are not things *so required by law* that non-compliance therewith constitutes a crime or offense under or against any law of the United States.

No question is raised with respect to the *validity* of Section 21, U. S. C. Title 50, or the rules and regulations promulgated thereunder, and no collateral attack is made upon either.

It is respectfully submitted, however, that in the light of the foregoing principles, as expounded in the case of *United States* v. *Eaton*, 144 U. S. 677, an essential element in the constitution of a crime against the United States is lacking.

Summary of Argument

POINT I. Section 21, U. S. C. Title 50, is not a penal statute. It defines no crime. It prescribes no punishment. It contains no legislative standard. It is merely declaratory of certain war powers and it provides an exclusive, plenary remedy for enforcing such powers.

POINT II. The Presidential Proclamation, No. 2537, dated January 14, 1942, and the rules and regulations of the Attorney General respecting registration of enemy aliens, promulgated under authority of Section 21, U. S. C. Title 50, are mere administrative rules and regulations, and do not have such force and effect at law that non-compliance therewith constitutes a crime under any law of the United States.

POINT III. The decision of the United States Circuit Court of Appeals for the Second Circuit is in apparent conflict with the decisions of this Court in *United States* v. *Eaton*, 144 U. S. 677, and *Singer* v. *United States*, 323 U. S. 338.

ARGUMENT

POINT I

Section 21, U. S. C. Title 50, is not a penal statute. It defines no crime. It prescribes no punishment. It contains no legislative standard. It is merely declaratory of certain war powers and it provides an exclusive, plenary remedy for enforcing such powers.

The section provides as follows:

> SECTION 21. *Restraint, regulation, and removal.* Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part

> of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety" (Apr. 16, 1918, c. 55, 40 Stat., R. S. 4067).

This section is derived from the Act of July 6, 1798, c. 66, § 1, 1 Stat. 577, as amended by the Act of April 16, 1918, c. 55, cited in the text. The amendment consisted only in striking therefrom the word "males" between the word "being" and the words "of the age of fourteen years and upward".

It is based, we believe, upon a recognition of the fact that citizenship is an accident of birth, and that while war gives aliens the status of "enemies", it does not make criminals of them. They are to be treated on a different basis, under the Geneva Convention and the Law of Nations, as "Prisoners of War", and not as felons, confined in a penitentiary at hard labor. This distinction rests upon universal recognition of the fact that patriotism and loyalty to one's own people, like citizenship, are also accidents of birth, and that in times of war, we have no moral right to demand or expect loyal and patriotic support from those "alien enemies" found within our borders upon the declaration of a state of war.

Thus it has been recently stated in the *United States ex rel. Schwarzkopf* v. *Uhl,* C. C. A. 2nd, Aug., 1943, 137 F. (2nd) 898, 902:

> "The obvious purpose of the act was to include within its ambit all aliens who by reason of ties of nationality or allegiance might be likely to favor 'the hostile nation or government' and might therefore commit acts dangerous to our public safety if allowed to remain at large."

The early authorities were marshalled in the case of *Delacey* v. *U. S.* (C. C. A. Cal. 1918), 249 Fed. 625, 161 C. C. A. 535. Nowhere is there any suggestion that the powers conferred are of a penal nature; indeed, to the contrary.

> "The first reported case arising under the Alien Enemy Act is Lockington's Case, Brightly, N. P. (Pa.) 269. Lockington, an alien enemy, had refused to comply with the executive order of February 23, 1813, requiring alien enemies who were within 40 miles of tidewater to retire to such places beyond that distance from tidewater as should be designated by the marshals. He was arrested, and on petition for habeas corpus attempted to test the legality of his imprisonment. Chief Justice Tilghman said of the act:
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> > " 'It is a provision for the public safety which may require that the alien should not be removed but kept in the country under proper restraints. * * * It is never to be forgotten that the main object of the law is to provide for the safety of the country from enemies who are suffered to remain within it. In order to effect this safety, it might be necessary to act on sudden emergencies. * * * The President, being best acquainted with the danger to be apprehended, is best able to judge of the emergency which might render such measures necessary. Accordingly, we find that the powers vested in him are expressed in the most comprehensive terms.'
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> * * * * * *
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> "And answering the contention that judicial authority must be resorted to to enforce the regulations so established by the President under the law, he (Washington, Circuit Justice, in Lockington v. Smith, 1 Pet. C. C. 466, Fed. Cas. No. 8, 448) said:
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> > " 'Such a construction would, in my opinion be at variance with the spirit as well as with the letter of the law, the great object of which was to provide for the public safety by imposing such restraints upon alien enemies as the chief executive magistrate of the United States might think necessary, and of which his particular situation enabled him best to judge.'

"In the Case of Fries, 9 Fed. Case No. 5126, Circuit Justice Iredell, charging the jury concerning the provisions of The Alien Enemy Act said:

> "'In cases like this it is ridiculous to talk of the crime, because perhaps the only crime that a man can then be charged with is his being born in another country and having a strong attachment to it. He is not punished for a crime that he has committed, but deprived of the power of committing one hereafter, to which even a sense of patriotism may tempt a warm and misguided mind. * * * The opportunities during a war of making use of men of such a description are so numerous and so dangerous that no prudent nation would ever trust to the possible good behavior of many of them.'"

Thus, the President, by his Proclamations of December 7 and 8, 1941 (Nos. 2525, 2526, 2527), vested the Attorney-General with summary power, under Section 21 of Title 50, to intern "alien enemies" whom he deemed dangerous to our security; which is to say, any alien whose loyalty appeared to be to his own country rather than to ours. Beyond this, the President further declared that those aliens who were not so interned, should comply with certain regulations respecting their conduct, and he charged the Attorney-General with the duty or responsibility of seeing that these regulations were observed. The details were left to the discretion of the Attorney-General, and he was authorized to declare such further regulations as might be necessary or appropriate in the premises.

But it does not follow that the regulations proclaimed by the President, or subsequently issued by the Attorney-General, could be enforced, *in the absence of congressional ratification,* by resort to the criminal code.

We have no fault to find with any of the rules or regulations promulgated thereunder, or under Proclamation No. 2537 of January 14, 1942. Indeed, we are in no position to criticize or question them. But we do most respectfully urge that any non-compliance with such regulations at most could do nothing more than evidence a state of

mind, or loyalty, that bears upon the question whether a given alien should be interned or required to give some further security for good behavior. This is an extraordinary administrative remedy, authorized by the terms of Section 21, and duly proclaimed by the President. It is exclusive under the circumstances, and plenary in scope, but it is not "criminal". And it is by reason of this distinction that the writ of habeas corpus has been suspended in cases of internment, thereby placing the application of the remedy beyond the realm of judicial review.

How is it possible to assert and maintain, as the Department of Justice inevitably must, that the congressional authority (Section 21, U. S. C. Title 50) for the exercise of this plenary, non-reviewable function or power was at one and the same time authority for the promulgation of administrative rules and regulations having the full force and effect of law and therefore enforceable by reference to the criminal code?

POINT II

The Presidential Proclamation, No. 2537, dated January 14, 1942, and the rules and regulations respecting registration of enemy aliens, promulgated under authority of Section 21, U. S. C. Title 50, are mere administrative rules and regulations, and do not have such force and effect at law that non-compliance therewith constitutes a crime under any law of the United States.

This Proclamation, after reciting that the President was acting under authority of Sections 21 et seq., Title 50, U. S. C., states in part:

> "All alien enemies within the continental United States * * * are hereby required, at such times and places and in such manner as may be fixed by the Attorney General of the United States, to apply

> for and acquire certificates of identification; and the Attorney General is hereby authorized and directed to provide, as speedily as may be practicable, for the receiving of such applications and for the issuance of appropriate identification certificates, and to make such rules and regulations as he may deem necessary for effecting such identifications; and all alien enemies and all other persons are *hereby required to comply with such rules and regulations.*" (Italics ours.)

It may be observed at this point that if the italicized language means anything it must mean the authority vested in the Executive by Section 21 of Title 50, the power to intern anyone who failed to respond and comply therewith.

There does not appear to be any dispute about the first part of this point. In the brief submitted below in opposition to the petitioner's motion for bail pending appeal, the following statement was made:

> "As we shall see in a moment, the regulations pertaining to Certificates of Identification, issued by the Attorney General, were administrative and non-discretionary and wholly reasonable."

However, the crux of the matter is in the application of the doctrine laid down in *United States* v. *Eaton,* 144 U. S. 677, and *Singer* v. *United States,* 323 U. S. 338. According to this doctrine, in the *Eaton* case, non-compliance with a regulation of the Commissioner of Internal Revenue, issued under authority of Section 20 of the Oleomargarine Act of August 2, 1886 (24 Stat. 209) was held not punishable under Section 18 of the same Act because the thing required by the regulation was not a thing *required by law.*

It is respectfully submitted that the doctrine of the *Eaton* case is controlling herein, and that a violation of the Attorney General's regulations issued under authority of Section 21, U. S. C. Title 50, is no more punishable under Section 80, U. S. C. Title 18, than the violation of the Com-

missioner's regulations was punishable under Section 18 of the Oleomargarine Act. At pages 687-688 of the opinion the Court said:

> "• • • It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commending it', 4 American & English Encyclopedia of Law, 642; 4 BL. Com. 5.
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> "It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' • • •.
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> "Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required, as to make the neglect to do the thing a criminal offense in a citizen, when a statute does not distinctly make the neglect in question a criminal offense."

This decision was recently cited by this Court in the case of *Viereck* v. *United States,* 318 U. S. 242, 63 S. Ct. 563, wherein it was said:

> "One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress. United States v. George, 228 U. S. 14, 20-22; Williamson v. United States, 207 U. S. 425, 453-62; United States v. Standard Brewery, 251 U. S. 210, 219-20; *United States* v. *Eaton,* 144 U. S. 677; United States v. Grimaud, 220 U. S. 506; United States v. Small, 236 U. S. 405; In re Kollack, 165 U. S. 526."

The *Eaton* case was cited and distinguished in *United States* v. *Grimaud,* 220 U. S. 506, 515, 518-519, and in *United*

States v. *McDermott* (C. C. A. 7th, Nov., 1942), 131 F. (2nd) 313, 316, and cited and followed in *Hudspeth* v. *Melville* (C. C. A. 10th, Nov., 1941), 127 F. (2nd) 373, 375, wherein the Court stated:

> "There is no common law offense against the United States * * * (citing cases) * * *. The criminal jurisdiction of the courts of the United States is derived exclusively from acts of Congress * * * (citing additional cases)."

And thus in another case, *United States* v. *11,150 Pounds of Butter* (C. C. A. 8th, 1912), 195 Fed. 657, it was held that a regulation of an executive officer or department, under legislative authority to make rules to enforce an act of Congress, which regulation subjects classes of property to forfeiture and classes of persons to penalties that are excluded by the statute, is void. In the opinion of the Court (pp. 663-664):

> "Implied authority in an executive officer or department to repeal, extend, or modify an act of Congress, may not be lawfully inferred from authority to enforce it, and a regulation of the Secretary of the Treasury, or other executive officer, made under legislative authority to make rules to enforce an Act of Congress, which has the effect to subject classes of property to forfeiture and classes of persons to fines and penalties under the Act, that are excluded therefrom by the terms of the law, is unauthorized and void * * *. The definition of offenses, the classification of offenders, and the prescription of the punishment they shall suffer, are legislative, and neither executive nor judicial functions. And forfeitures, fines, and penalties, may not be prescribed, imposed, or inflicted for violations of a regulation of an executive without previous legislative prescription."

Of paramount interest, however, in relation to the petition herein, is the very recent decision of this Court in *Singer* v. *United States*, 323 U. S. 338, a five to four decision, wherein the Court stated at pages 344-345:

"It is said that United States v. Eaton, 144 U. S. 677, established a principle of federal criminal law that a provision which only punishes violations of a 'law' does not cover violations of rules and regulations made in conformity with that law. It is therefore argued that Section 6 of the Criminal Code does not embrace violations of rules or regulations and that Section 11 filled that gap by adding 'rules and regulations' to the force and violence clause. Here again the legislative history leaves that question wholly to conjecture. United States v. Eaton turned on its own special facts, as United States v. Grimaud, 220 U. S. 506, 518-519, emphasizes. It has not been construed to state a fixed principle that a regulation can never be a 'law' for purposes of criminal prosecution. *It may or may not be depending on the structure of the particular statute.*" (Italics ours.)

Thus while the majority of the Court distinguished the *Eaton* case on the particular facts involved, the question whether Section 80, U. S. C. Title 18, should be construed to cover statements made to the Department of Justice, pursuant to administrative regulations of the Attorney General issued under authority of Presidential Proclamation No. 2537 of January 14, 1942, and Section 21, U. S. C. Title 50, is *an open one which should be decided by this Court.*

Beyond this, however, it is respectfully submitted that, if the view expressed in the minority opinion should be held applicable to the instant case, then no crime was charged in the indictment and the District Court was without jurisdiction to enter judgment of conviction. At pages 350-351, the dissenting opinion by Mr. Justice Frankfurter states:

"United States v. Eaton is not a judicial sport. It is the application of a principle which has been undeviatingly applied by this Court—most recently in Viereck v. United States, 318 U. S. 236, 241—and upon the basis of which Congress legislates. In re Kollock, 165 U. S. 526; United States v. Grimaud, supra; United

States v. George, 228 U. S. 14. The principle is that a crime is defined by Congress, not by an executive agency. See United States v. Small, 236 U. S. 405, 409. 'Where the charge is of crime, it must have clear legislative basis.' United States v. George, supra, at 22. It is only when Congress in advance prescribes criminal sanctions for violations of authorized rules that violations of such rules can be punished as crimes. It is this far-reaching distinction which, it was pointed out in the Grimaud case, put on one side the doctrine of the Eaton case, where a violation of rules and regulations was not made criminal, and on the other side legislation such as that enforced in the Grimaud case where Congress specifically provided that 'any violation of the provisions of this Act or such rules and regulations [of the Secretary of Agriculture] shall be punished.' (Italics added by Mr. Justice Lamar). United States v. Grimaud, supra, at 515."

POINT III

The decision of the United States Circuit Court of Appeals for the Second Circuit is in apparent conflict with the decisions of this Court in *United States* v. *Eaton*, 144 U. S. 677, and *Singer* v. *United States*, 323 U. S. 338.

The decision of the Circuit Court is printed in the record certified to this Court, at page 11 thereof, and in the Appendix to this brief at page 19. Inasmuch as it cites only the *Heine* case and the *Barra* case, argued and decided at the same time as the instant case, the relevant portions of these two opinions are also incorporated in the Appendix hereto at pages 19 and 20 respectively.

It is to be noted that the issue as to the applicability of Section 80, U. S. C. Title 18, to the false statement charged in the indictment was affirmatively decided in the *Heine* case, on the authority of *United States* v. *Meyer*, 140 F. (2nd) 652, and *United States* v. *Gilliland*, 312 U. S. 86.

It is respectfully submitted that neither of these cases is in point, and that the decision below, therefore, rejects the doctrine of *United States* v. *Eaton,* and fails to make the appropriate and necessary determination found in *Singer* v. *United States,* supra.

The case of *United States* v. *Meyer* involved the application of Section 80, U. S. C. Title 18, to false statements made before an army exclusion board established under Executive Order No. 9066, issued February 19, 1942. The decision is founded upon the case of *Hirabayashi* v. *United States,* 320 U. S. 81, wherein this Court held that Congress by the Act of March 21, 1942 (Section 97(a), U. S. C. Title 18) had "ratified and confirmed Executive Order No. 9066", the standard therein set forth, and the Proclamations issued thereunder.

Based upon this "ratification", the *Meyer* decision held that later Proclamations under the same Executive Order No. 9066, establishing exclusion boards and prescribing the procedure to be followed, had the full force and effect of law (as distinct from mere administrative regulations), and in consequence, a false statement made in such proceeding was a false statement within the purview of Section 80, U. S. C. Title 18.

United States v. *Gilliland,* 312 U. S. 86, on the other hand, involved the application of this same section to false reports filed pursuant to regulations issued under authority of the National Recovery Act. The Court held that the subsequent determination that the Act was unconstitutional was not a bar to prosecution for the filing of false reports, during the period while there was *apparent* authority for the regulations requiring the reports.

This doctrine of apparent or colorable authority, however, cannot serve to raise mere administrative regulations, such as we are admittedly concerned with herein, to the dignity of regulations having the full force of law. This is the province of Congress. Such regulations must have a legislative foundation, which is to say, they must either rest upon a *standard* enacted by Congress or gain their force from subsequent *ratification.*

It is respectfully submitted that the decision of the Circuit Court is therefore in apparent conflict with the applicable decisions of this Court.

CONCLUSION

For the reasons stated in the petition herein and this brief in support thereof, it is respectfully submitted that the indictment below failed to charge a crime against any law of the United States, and the District Court for the Eastern District of New York was at all times without jurisdiction to enter judgment and commitment in the premises.

Wherefore it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit should be granted.

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